Supreme Court, U.S.
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No. _____

IN THE

# United States Supreme Court

OCTOBER TERM, 1996

**ABRAHAM W. BOLDEN, SR.**

*Petitioner*

v.

**UNITED STATES OF AMERICA**

*Respondent*

On Petition For Writ of Certiorari to the
United States Court of Appeals For The Seventh Circuit

# PETITION FOR WRIT OF CERTIORARI

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17 pp

**The Question Presented for Review is as follows:**

**Is the conviction of Petitioner constitutionally valid where the trial judge delivered an impromptu instruction to the deliberating jury expressing the court's opinion that the evidence warranted a verdict of guilty during the first trial of Petitioner and proceeded, in statutory excess of jurisdiction, to summarily deny Petitioner's Affidavit and Motion for substitute judge predicated upon said prejudicial instruction to the deliberating jury timely filed prior to the second trial in which Petitioner was convicted?**

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## STATEMENT OF FACTS

In June, 1964, Petitioner, then an agent of the United States Secret Service, was indicted on a federal indictment returned in the United States District Court, Northern District of Illinois, Eastern Division on charges of seeking a bribe in return for acting in violation of official duty, 18 U.S.C. Sec. 201, corruptly obstructing the due administration of justice, 18 U.S.C. Sec. 1503, and conspiring with another person to commit these crimes, 18 U.S.C. Sec. 371. Petitioner was convicted of the charges in August, 1964 and was sentenced to six years incarceration. (see United States v. Bolden, 64 CR 324)

On direct appeal to the United States Court of Appeals for the Seventh Circuit on March 26, 1965, Petitioner's conviction was affirmed and the United States Supreme Court denied certiorari. United States v. Bolden, 355 F. 2d 453 (1965 C.A.7), cert. denied 384 U.S. 1012 (1966)

On August 18, 1994, Petitioner filed a Petition to Expunge Conviction challenging the validity of conviction on constitutional grounds. An amendment to the petition asserting new evidence of documented egregious misconduct on the part of government prosecutors during the trial of conviction was filed on November 14, 1994. Said Petition to Expunge Conviction was construed by the court as Petition for Writ of Error Coram Nobis and for reason that the court found no basis for granting a Writ of Error Coram Nobis, the court denied said petition on October 19, 1995. (see Appendix - Judges Memorandum and Order)

Petitioner filed Notice of Appeal to the Seventh Circuit Court of Appeals on October 27, 1995 and on September 12, 1996, said court affirmed the decision of the District Court. Bolden v. United States, 95-3582 (1995 C.A.7)

## JURISDICTIONAL STATEMENT

On August 18, 1994, Petitioner filed Petition to Expunge Conviction construed as Petition for Writ of Error in the Federal District Court. Said Petition embodied as cause of action the Question Presented for Review before this Honorable Court. The Petition for Writ of Error having been denied in Federal District Court on October 19, 1995 and affirmed by the United States Court of Appeals for the Seventh Circuit on September 12, 1996, Petitioner contends that the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner therefore appeals the decision of the United States Court of Appeals for the Seventh Circuit to the United States Supreme Court and seeks grant of Petition for Writ of Certiorari under the authority of 28 U.S.C. Sec. 1254 (1).

## APPLICABLE LAWS AND STATUTES

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| U.S. Const. Amend. V | No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be* |

| | |
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| | *deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis Added) |
| U.S. Const. Amend VI | In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the state and district wherein the crime shall have been committed..... (Emphasis Added) |
| 28 U.S.C. Sec. 144 | Whenever a party to any proceeding in a District Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of the adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. |
| 28 U.S.C. Sec. 455 (a) | Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. |
| Rule 605, Fed. Civ. R | The presiding judge at the |

trial may not testify in that trial as a witness.

## ARGUMENT

I. On or about July 10, 1964 during the deliberation of the jury in Petitioners first trial, the trial judge gave the following impromptu instruction for the jury's consideration:

> "Now, ladies and gentlemen of the jury, I will exercise a prerogative which I have as a judge, which I rarely exercise. I will express to you and comment upon the evidence. In my opinion, the evidence sustains a verdict of guilty on counts 1, 2, and count 3. You may disregard my opinion only if you conscientiously disagree with my findings."

No verdict was returned by that jury and a mistrial was declared. United States v. Bolden, 64CR324

This Honorable Court, in past opinions, has consistently ruled that in commenting upon the evidence the trial judge may not assume the role of a witness. Quercia v. U.S., 1933, 53 S. Ct. 698, 289 U.S. 466, 77 L. Ed. 1321. Moreover, he (the trial judge) should not assume the role of counsel or say anything that might prejudice either party. Callen v. Pennsylvania R. Co., 1947, 68 S. Ct. 296, 332 U.S. 625, 92 L. Ed. 242. A trial judge may not assume the role of the 13th juror. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Petitioner contends that the instruction and comment upon the evidence was beyond the guidelines and limitations as established by this

Honorable Court and violated the constitutional and civil rights of Petitioner to the degree as to disqualify the trial judge from judicial administration of further proceedings. 28 U.S.C. Sec. 455(a)

II. On July 31, 1964, Petitioner Filed Affidavit and Petition for substitute judge predicated upon the allegation of judicial prejudice. Title 28, U.S.C. Sec. 144 prohibited the trial judge before whom the matter was pending from hearing the Petition or deciding the merits of same. The trial court as consequence of federal statute was incompetent as to subject matter jurisdiction and "the extent of a court's jurisdiction is determined by statutory or constitutional provisions which explicitly outline the parameters of that court's power." R. Casad, *Jurisdiction in Civil Actions* 1-3 (1983). Courts must have jurisdiction over the subject matter of the controversy before a valid judgement may be entered. R. Casad, supra 1-2. Moreover, if either subject matter or jurisdiction over the parties is missing, the judgement entered in the proceeding is void. Hanson v. Denckla, 357 U.S. 235, 255 (1958). Therefore, the second trial of Petitioner was without legal foundation as to trial court's jurisdiction and invalid under the laws of these United States.

## CONCLUSION

Wherefore, for causes stated in Question Presented for Review, Petitioner prays this Honorable Court to grant Petition for Certiorari and remand, set aside, or otherwise vacate the unlawful conviction of Petitioner.

Respectfully Submitted,
Abraham W. Bolden, Sr.
Pro Se

# APPENDIX

I. MEMORANDUM OPINION AND ORDER denying Writ of Error Coram Nobis, the Honorable Judge William T. Hart, dated October 19, 1995

II. ORDER of United States Court of Appeals affirming judgement dated September 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| ABRAHAM W. BOLDEN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 64 CR 324 |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION AND ORDER

As of May 1964, defendant Abraham Bolden was a Secret Service agent. He was charged with soliciting payments in return for providing a criminal defendant with a copy of the Secret Service's investigation file on that defendant. Bolden was indicted on charges of seeking a bribe in return for acting in violation of his official duty, 18 U.S.C. § 201, corruptly obstructing the due administration of justice, 18 U.S.C. § 1503, and conspiring with another person to commit these crimes, 18 U.S.C. § 371. In the first trial on these charges, the jury could not reach a verdict. Following a second trial, however, Bolden was found guilty on all three charges. He was sentenced to six years' incarceration. Bolden's conviction was affirmed on appeal and the Supreme Court denied certiorari. See United States v. Bolden, 355 F.2d 453 (7th Cir. 1965), cert. denied, 384 U.S. 1012 (1966). Bolden apparently has served his

entire sentence.

In August 1994, Bolden proceeding pro se, filed a document he labeled as a "petition to expunge." In November, he amended his petition, adding additional contentions. The government responded arguing that the petition should be denied and Bolden filed a reply.

In his petition, Bolden requests that this court "expunge the conviction or . . . take such action deemed proper by this Honorable Court that will validate and certify the constitutional rights of Petitioner as a free and accepted citizen of the United States of America."

Bolden does not point to any statute that provides for expunging federal convictions. There is inherent authority to expunge court records under limited circumstances. See United States v. Janik, 10 F.3d 470, 472-73 (7th Cir. 1993); United States v. Gold, 1995 WL 307296 *2-3 (N.D. Ill. Feb. 15, 1995). The Seventh Circuit, however, has also held that there is no jurisdiction to order executive agencies to expunge their records. Janik, 10 F.3d at 472; Gold, 1995 WL 307296 at *2. Records of inactive criminal cases of this court are transferred to a federal records center, but this court retains control. However, after approximately twenty years, files for criminal cases that went to trial are transferred to the Federal Archives. While the court still has access to the files in that they can be borrowed from the Federal Archives, at that point the files become the property of the Federal Archives. The record in this case has previously been transferred to the Federal Archives.

To the extent that Bolden seeks to have the file itself expunged, this court has no jurisdiction to do so because the file is now in the control of the Federal Archives; it is no longer property of the court. Even if there were jurisdiction, it is doubtful that it is appropriate to expunge records of a conviction that has never been vacated and a motion to expunge a record is a procedure distinct from vacating a conviction because obtained in violation of the Constitution. To the extent Bolden is seeking to expunge the court record in this case (or any related file of an executive agency), his motion will be denied.

When Bolden states that he desires to "expunge the conviction," more likely he means that he wishes to vacate the conviction. Perhaps he did not use that word because the ordinary method for vacating a conviction, a motion pursuant to 28 U.S.C. § 2255, is no longer available to him in that he has completed all components of his sentence and therefore is no longer in custody as is required for such a motion. See Howard v. United States, 962 F.2d 651, 653 (7th Cir. 1992); United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989). The method that may apply to a person who has already served his sentence is a writ of error coram nobis. See id. That Bolden has not so titled his petition is of no consequence. See, e.g., Lewis v. United States, 902 F.2d 576, 577 (7th Cir.), cert. denied, 498 U.S. 875 (1990). Bolden's filing will be construed as a petition for writ of error coram nobis.

A writ of error coram nobis will

"only be allowed under compelling circumstances as it is an extraordinary remedy." Howard, 962 F.2d at 653. There are two basic requirements for coram nobis relief: the conviction must be infirm and there must be a substantial legal disability. See Keane, 852 F.2d at 203. The grounds for overturning the conviction must be one on which relief could have been granted if the petitioner were still in custody. It must be a fundamental defect that produces a miscarriage of justice. Id. at 204. Also, it may not be an issue that could have been raised while in custody or which has already been fully litigated. See id. at 202-03. The defendant must have acted diligently in pursuing relief. See United States v. Darnell, 716 F.2d 479, 480-81 (7th Cir. 1983), cert. denied, 465 U.S. 1083 (1984). The requirement of being under a substantial legal disability is also a strict requirement. The disability must be one that is unique to criminal convictions. Keane, 852 F.2d at 203. It must be a present harm, causally linked to the conviction, and more than incidental. Howard, 962 F.2d at 653-54 (quoting United States v. Craig, 907 F.2d 653, 658, amended, 919 F.2d 57 (7th Cir. 1990), cert. denied, ___ U.S. ___ (1991)). The Seventh Circuit has held that loss of the right to travel to a foreign country, Howard, 962 F.2d at 655, the possibility of having a previously assessed fine refunded, Keane, 852 F.2d at 204, and a blot on one's record, id., are all insufficient to constitute a substantial legal disability.

Bolden has not alleged any legal disability that he is suffering as a

result of having been convicted. Therefore, Bolden has failed to satisfy the requirement of being under a substantial legal disability. The government, however, has not raised this issue in that it failed to consider the possibility of coram nobis relief. But even if Bolden could satisfy the legal disability requirement, there is another basis for denying relief.

Bolden's petition would also fail as to the grounds alleged for finding his conviction to be invalid. Bolden does not allege there is any newly discovered evidence that prevented him from raising any issue while still in custody or justifying his seeking coram nobis relief almost thirty years after his conviction. Most of the issues now raised were already raised on direct appeal and therefore cannot be considered anew, even if there had been an intervening change in the law.[1] See Keane, 852 F.2d at 203, 205-06. There is no indication that any of the issues raised are based on information unavailable at the time of the direct appeal or while in custody.

For the foregoing reasons, Bolden does not present any basis for granting a writ of error coram nobis and vacating his 30 year old conviction.

IT IS THEREFORE ORDERED that defendant's petition to expunge (construed as a petition for writ of error coram nobis) is denied. The Clerk

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[1]In any event, Bolden does not contend there has been an intervening change in the law.

of the Court is directed to enter judgement in favor of the United States and against defendant denying his petition to expunge (construed as a petition for writ of error coram nobis).

ENTER:

"S/William T. Hart"
UNITED STATES DISTRICT JUDGE

DATE: OCTOBER 19, 1995

# United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 10, 1996*

Decided September 12, 1996

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

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| ABRAHAM W. BOLDEN, SR., *Petitioner-Appellant,* | ) | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| No. 95-3582 v. | ) | |
| UNITED STATES OF AMERICA *Respondent-Appellee.* | ) | 64 CR 324 William T. Hart, *Judge.* |

## ORDER

Abraham W. Bolden, Sr., appeals the denial of his "Petition to Expunge," which the district court construed as a petition for a writ of error coram nobis. For the reasons stated by the district court in its order dated October 19, 1995, the judgment of the district court is AFFIRMED.

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary; accordingly, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).